

THE FOURTH AMENDMENT, THE EXCLUSIONARY RULE, AND
THE ROBERTS COURT: NORMATIVE AND EMPIRICAL
DIMENSIONS OF THE OVER-DETERRENCE HYPOTHESIS

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Supreme Court watchers anticipate a fresh assault on the Fourth Amendment exclusionary rule by the Roberts Court. This apprehension requires no great subtlety of perception; in *Hudson v. Michigan*,¹ a majority of the Court baldly announced that the rule had outlived its usefulness. The Court's decision to broaden the good-faith exception to the exclusionary rule in *Herring v. United States*² is another sign.

This essay engages in the risky business of predicting future Supreme Court developments. In the first part, I analyze the evidence suggesting that the Roberts Court might abolish the exclusionary rule. The critique of exclusion in *Hudson* is both less and more probative than appears at first blush. Justice Kennedy joined that part of the opinion, making a majority, but then filed a concurrence disavowing any intention of abolition. On the other hand, the willingness of a majority to join an opinion bereft of empirical support and willfully blind to long-standing and cogent contrary arguments rather forcefully suggests a group of men with minds made up.

Part II turns to some less obvious evidence pointing in the direction of retaining the exclusionary rule. First, abolition of the exclusionary rule is inconsistent with the *Hudson* majority's apparent contentment with prevailing police behavior. The exclusionary rule is a component of the status quo, so unless a majority believes that police behavior should become significantly *more* aggressive and intrusive, abolition would not reflect the policy preferences of that majority. Put another way, the case for abolition presupposes that the current remedial mix over-deters Fourth Amendment violations. Both logic and the available empirical evidence suggest otherwise.

Second, abolition of the exclusionary rule would curtail the power of the Supreme Court. Combined, the infrequency of suits and qualified immunity would bring very few substantive Fourth Amendment issues to the

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1. 547 U.S. 586 (2006).

2. 129 S. Ct. 695 (2009).

Court. A majority is unlikely to reduce its own power in this way, particularly given that this same majority can always rule for the police on the merits. We do not need to consult the wisdom of the founders or the statistics of political scientists to prove the point. The Supreme Court's own criminal procedure doctrine makes the case. A majority is not likely to cede power over search-and-seizure to state courts, legislatures, and police administrators.

Part III offers a prediction of a somewhat different sort. If the Court were to abolish the exclusionary rule, the exclusionary rule would return, in some form, in a decade or so. Police—yea, even modern, professional police—consistently have shaped their behavior according to admissibility rather than legality. Wholesale abolition of the exclusionary rule would lead to enough flagrant abuses that even the current justices would likely bring the rule back. Changes in the composition of the Court might make this more likely still.

Prediction is hazardous. I hazard, however, the prediction that the Roberts Court will not abolish the Fourth Amendment exclusionary rule.

I. HUDSON

The issue in *Hudson* was whether the exclusionary rule applies to evidence obtained in the search of a residence authorized by a valid warrant but executed inconsistently with the knock-and-announce requirement announced in *Wilson v. Arkansas*.³ The Court divided five to four, holding that the rule does not apply. This result could have been reached on the ground of inevitable discovery,⁴ and the majority noted as much.⁵

Part IIIB of the opinion nonetheless deployed the now familiar cost-benefit balancing test.⁶ The majority went so far as to say that the costs of exclusion outweighed the benefits even if the knock-and-announce rule would be nullified by withholding this remedy.⁷ Justice Scalia's discussion repeats the pro-police mantra: exclusion is a "massive remedy"⁸ that carries

3. *Hudson*, 547 U.S. at 588–89 (citing *Wilson v. Arkansas*, 514 U.S. 927, 931–32 (1995)).

4. *Id.* at 604 (Kennedy, J., concurring) ("In this case the relevant evidence was discovered not because of a failure to knock and announce, but because of a subsequent search pursuant to a lawful warrant. The Court in my view is correct to hold that suppression was not required.")

5. *Id.* at 601 ("While acquisition of the gun and drugs was the product of a search pursuant to warrant, it was not the fruit of the fact that the entry was not preceded by knock-and-announce.")

6. *Id.* at 594–99.

7. *Id.* at 596 ("Of course even if this assertion [that without suppression there will be no deterrence of knock-and-announce violations at all] were accurate, it would not necessarily justify suppression.")

8. *Id.* at 599 ("Resort to the massive remedy of suppressing evidence of guilt is unjustified.")

“substantial social costs.”⁹

The opinion adds, however, a new argument: Fourth Amendment remedies may have been inadequate when *Mapp* was decided in 1961, but those remedies are much stronger now.¹⁰ Justice Scalia pointed to the recognition of entity liability in *Monnell*,¹¹ the provision authorizing payment of attorney’s fees to successful § 1983 plaintiffs,¹² and the increasing professionalization of the police.¹³

9. The Court stated:

Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates “substantial social costs,” which sometimes include setting the guilty free and the dangerous at large. We have therefore been “cautio[us] against expanding” it, and “have repeatedly emphasized that the rule’s ‘costly toll’ upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.” We have rejected “[i]ndiscriminate application” of the rule, and have held it to be applicable only “where its remedial objectives are thought most efficaciously served,”—that is, “where its deterrence benefits outweigh its ‘substantial social costs.’”

Id. at 591 (citations omitted).

10.

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago. Dollree Mapp could not turn to . . . 42 U.S.C. § 1983 for meaningful relief; *Monroe v. Pape*, 365 U.S. 167 (1961), which began the slow but steady expansion of that remedy, was decided the same Term as *Mapp*.

Id. at 597 (citing *Mapp v. Ohio*, 367 U.S. 495 (1961)).

11. *Id.* (“It would be another 17 years [after the decision in *Mapp*] before the § 1983 remedy was extended to reach the deep pocket of municipalities [in] *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, (1978). Citizens whose Fourth Amendment rights were violated by federal officers could not bring suit until 10 years after *Mapp*, with this Court’s decision in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388(1971).”).

12. *Id.* (“Since some civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney’s fees for civil-rights plaintiffs. This remedy was unavailable in the heydays of our exclusionary-rule jurisprudence, because it is tied to the availability of a cause of action.”).

13.

Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline. Even as long ago as 1980 we felt it proper to “assume” that unlawful police behavior would “be dealt with appropriately” by the authorities . . . but we now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously. There have been “wide-ranging reforms in the education, training, and supervision of police officers.”

Id. at 598–99 (quoting SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990* 51 (1993)). Dr. Walker subsequently protested that Justice Scalia had failed to appreciate the extent to which police professionalism is a product of the exclusionary rule:

Scalia’s opinion suggests that the results I highlighted have sufficiently removed the need for an exclusionary rule to act as a judicial-branch watchdog over the police. I have never said or even suggested such a thing. To the contrary, I have argued that the results reinforce the Supreme Court’s continuing importance in defining constitutional protections for individual rights and requiring the appropriate remedies for violations, including the exclusion of evidence.

Samuel Walker, Opinion, *Thanks for Nothing, Nino*, L.A. TIMES, at M5, available at <http://articles.latimes.com/2006/jun/25/opinion/oe-walker25> (June 25, 2006).

If this isn't a brief for abolition, it sure looks like one. Indeed, it is difficult to characterize Part IIIB as anything else, given the ease with which the case could be resolved on other grounds. The really portentous aspect of *Hudson*, however, is not the content, but the character, of Justice Scalia's discussion.

Justice Scalia did not mention two cogent and long-standing arguments against the cost-benefit analysis. One is that the cost of lost convictions is attributable not to the exclusionary remedy but to the underlying Fourth Amendment right.¹⁴ If the police comply with constitutional standards, the evidence would never be discovered and the guilty would remain at large.

In unusual cases, like the knock-and-announce cases, compliance with constitutional standards does not prevent the discovery of the evidence. The inevitable discovery exception covers these cases. Whenever Fourth Amendment doctrine forbids discovery of evidence, a "cost" results only if a current policy preference for unlimited law-enforcement is given priority over the constitutional preference for limiting law-enforcement power.

In a minority of cases, exclusion costs the public a conviction the police might later have enabled without violating the Fourth Amendment. When police have probable cause but don't bother getting a warrant, or when they search an automobile with less than probable cause but later learn of information that would have gotten them over the hump, we can say that the exclusionary rule, rather than the Fourth Amendment, caused the loss of the evidence. Most of the time, however, the police never could have made a case without violating the Fourth Amendment, and the inevitable discovery exception again covers many of the cases where they might have done so.¹⁵

The second familiar argument Justice Scalia ignored is related to the first. Any effective remedy for Fourth Amendment violations will carry

14. See, e.g., *People v. Cahan*, 282 P.2d 905, 914 (Cal. 1955) ("It is contended, however, that the police do not always have a choice of securing evidence by legal means and that in many cases the criminal will escape if illegally obtained evidence cannot be used against him. This contention is not properly directed at the exclusionary rule, but at the constitutional provisions themselves."); see also Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1533 (1999) ("[M]ost of the people who make this criticism do not argue that the misconduct should be condoned or redefined as proper conduct; they merely advocate the substitution of other sanctions that would not involve excluding the fruits of the illegal search.")

15. See Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 12 (2001) ("Exclusion does terminate a few prosecutions that the Fourth Amendment might have permitted given better police work; but because the very great majority of crimes are not cleared by arrest there is good reason to doubt that perfect police work would have secured convictions in very many of those few cases lost to suppression motions.")

those same “substantial social costs.”¹⁶ Justice Scalia seems in a celebratory mood in writing about damage actions and police professionalism, as if searches that don’t take place because of the threat of tort liability or departmental discipline are somehow different from searches that don’t take place because of the threat of exclusion.

These points have been in the literature since the 1920s.¹⁷ If they were bad arguments we would expect exclusionary rule critics to acknowledge them and reply. Justice Scalia’s silence is telling in two ways. The first is that it corroborates the familiar critique of the Court’s cost-benefit approach. The second is that the very indifference to these familiar arguments reflects minds bent on a conclusion. There may be good rejoinders to the “blame the right not the remedy” and “damage actions have the same costs” arguments (although I have not seen compelling rejoinders in the literature). Anyone who was a fair-minded critic of the exclusionary rule who had such a rejoinder would surely have deployed it.

The claim that modern tort suits and modern police departments have made the exclusionary rule unnecessary reflects the same prejudice against the exclusionary rule. Legal recognition of municipal liability is both difficult to establish¹⁸ and practically irrelevant. Cities and police departments typically pay for the defense of claims against individual officers and indemnify the officers after a settlement or a plaintiff’s verdict.¹⁹ 42 U.S.C. § 1988(B), authorizing attorney’s fees for successful plaintiffs, passed the Congress in 1976. There is no correlative provision for *Bivens* actions.²⁰

The practically relevant rules for damage actions against the police

16. *E.g., id.* at 19 (“They would, however, carry the downside of effective deterrents: they would cause many crimes to go unexposed, foster police perjury to defeat liability, and might chill officers from conducting justified but borderline searches and seizures”) (footnotes omitted); Posner, *supra* note 14, at 1533 (“If the substitute sanctions were effective in deterring the misconduct, there would not be any fruits, and so there would be no net gain from the standpoint of accuracy in adjudication.”).

17. See Connor Hall, Letter to the Editor, *Evidence and the Fourth Amendment*, 8 A.B.A. J. 646, 647 (1922) (“If punishment of the officer is effective to prevent unlawful searches, then equally by this is justice rendered inefficient and criminals coddled. It is only by violations that the great god Efficiency can thrive.”).

18. John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 263 (2000) (“Occasionally, localities can be sued directly under § 1983 and held liable without proof of fault, but the circumstances are very limited.”).

19. *Id.* at 267 (“[G]overnments routinely defend their officers against constitutional tort claims and indemnify them for adverse judgments.”).

20. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1631 n.253 (2003) (“Fees are apparently unavailable for *Bivens* actions brought by federal inmates . . . because the Equal Access to Justice Act allows fees to be awarded against the federal government only when some other substantive statute authorizes them . . . or when a case is against the United States directly or an officer in his or her official capacity. . . . What little case law I have found on this subject suggests that neither condition holds for *Bivens* actions for damages, which are brought directly under the Constitution against officers in their individual capacities.” (citations omitted)).

thus have not changed for more than thirty years. If there has been a change, it has been cultural rather than legal. Marc Miller and Ron Wright's survey of reported settlements of suits against police presents persuasive evidence that the police can be sued successfully.²¹ Previous empirical work, however, indicated that recoveries against the police would be substantial primarily when the police had inflicted physical injuries, especially when the police acted in bad faith.²² As Wright and Miller point out, the secrecy of settlements means that we can only speculate about the nature of the claims. My own suspicion is that most of the settlements reported by Wright and Miller involved claims based on *Tennessee v. Garner*²³ or *Graham v. Connor*²⁴ and not illegal stops, arrests, or auto searches.

It is revealing that Justice Scalia did not cite Wright and Miller. Their article provides the best evidence, such as it is, of the practicality of tort suits against the police. Justice Scalia and his colleagues in the *Hudson* majority are, apparently, not interested in evidence, even when it supports their conclusion. The stony indifference to both contrary arguments and empirical evidence is a strong indication that the members of the *Hudson* majority are bent, implacably, on abolition.

II. COUNTERVAILING CONSIDERATIONS

A. *Hudson's Over-deterrence Hypothesis*

Hudson itself may be less portentous than first appears. The tone of section IIIB is more complacent than alarmist. Police behavior, once bad, is now acceptable, or so one may plausibly interpret the Court's discussion. The status quo, however, includes the exclusionary rule. A case for abolition therefore depends on the claim that the current remedial mix for Fourth Amendment violations is excessive. What does it mean to say a constitutional remedy is excessive? To answer that question we must grapple with the concept of over-deterrence, first normatively, and then from the standpoint of the available empirical evidence.

21. See Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 766–67 (2004).

22. See *id.* at 767 (“The largest cases tend to involve serious physical injuries or sexual misconduct by officers. The bigger payments also occur when officers act based on racial prejudice or some personal hostility to the plaintiff.”).

23. 471 U.S. 1 (1985) (authorizing damages when a law enforcement officer uses deadly force against a fleeing suspect who does not pose a threat to the safety of the officer or the public).

24. 490 U.S. 386 (1989) (authorizing damages when a law enforcement officer uses excessive force in making an arrest).

1. The Over-deterrence Concept

Remedies for the violation of legal rules optimally deter when potential violators rationally expect the value of the violation to be zero.²⁵ If violations can be expected to return net gains, the rule will be violated even when compliance would be possible at lower net cost. If the regulated actors rationally anticipate the value of violations to be negative, they will refrain from borderline but legal conduct with positive benefits or adopt precautions that cost more than the value of the violations they prevent.

The standard tort model has some plausibility as applied to suits against the police. Given the prevalence of defend-and-indemnify arrangements, cities or police departments are repeat players estimating the benefits and costs of their agents' behavior with respect to a large pool of cases. In many of the cases in the pool, the legality of police action will be uncertain *ex ante*. So over-deterrence and under-deterrence are both possible. The police could avoid all Fourth Amendment violations by playing pinochle in the station house, and they could uncover a lot of evidence by searching either on mere suspicion or *en masse*. Society favors neither extreme, and this looks a lot like how we think about industries that cause some harm but confer great benefits, like mining, transportation, power generation, and so on.

The difficulty in applying the optimal-deterrence prescription to search-and-seizure is that there is no symmetry between the gains the regulated actors secure from violations and the cost of those violations. Such symmetry is thought to exist in tort law, where damages are set so that the tortfeasor's damages equal the value of the plaintiff's loss, with punitives or pain-and-suffering damages thrown in to account, very roughly, for the reality that the probability of a successful suit even in meritorious cases is less than one.

When the police kill or injure the victim, tort damages can be estimated just as the tort system estimates damages for wrongful death or per-

25. For example, according to Eric Posner and Cass Sunstein:

As is well known, people can be given optimal incentives to take care if they are required to pay damages for any financial losses that they cause (or negligently cause). Imagine, for example, that a particular behavior, such as driving, will cause \$1,000 in losses if an accident occurs. A driver can control the probability that the loss will occur by taking more or less care. The cost of care increases with the amount of care that is taken. The efficient level of care is the amount at which the marginal cost of care equals the expected marginal cost of an accident. By requiring the tortfeasor to pay damages, the law forces the driver to internalize the losses that she creates, so that she will take precautions when the costs of those precautions are less than the expected losses.

Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 554–55 (2005) (footnotes omitted).

sonal injury in other cases. Even here, however, there is a good reason to doubt that damage actions achieve optimal deterrence of unlawful police violence. The qualified immunity defense means that police violence incurs liability only when it is clearly excessive. The police employer therefore does not expect to internalize the costs of every illegal police shooting or beating, with corresponding incentives to train and discipline the force. There are political incentives at work as well, but those may work in favor of aggressive policing as well as against it. Police immunity gives reason to doubt whether we are optimally deterring even police violence.

Damage actions, however, offer the only practical remedy for police misconduct not motivated by the desire to initiate a formal prosecution. The exclusionary rule does not deter police who beat up citizens for sport.²⁶ If we abolished qualified immunity (which was as unknown to the founders as the exclusionary rule) we might come closer to optimal deterrence. The risk, however, is that the prospect of liability might induce the police to refrain from violence even when justified, leading to the escape of dangerous felons. The immunity defense was created to prevent this very contingency.²⁷

The exclusionary rule influences police behavior in the pool of cases in which the objective of the search or seizure includes enabling a formal prosecution. Strictly speaking, the victim of an unlawful search who is prosecuted may both suppress the evidence on the criminal side and sue the officers on the civil side. Indeed, the Supreme Court has upheld so called plea-bargain/release agreements, in which the search victim waives civil remedies as part of a plea deal.²⁸

Typically, however, exclusion operates in cases where damage actions face formidable valuation problems. We can perhaps estimate the employer's benefit from the government's willingness to pay tens of thousands per year to incarcerate the guilty and the added expense of the police force itself. Any such calculation will typically dwarf the economic damage from unlawful stops, searches, and even arrests. Guessing about liquidated damages runs the risk of over-deterrence.

The *Hudson* majority seems to suppose that this remedial mix of damage actions, limited by qualified immunity and the exclusionary rule, is over-detering Fourth Amendment violations. To unpack the over-

26. See, e.g., Dripps, *supra* note 15, at 30 n.141.

27. John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CAL. L. REV. 1387, 1408 (2007) (“[A]ny attempt to extend damages liability to the case of borderline error runs headlong into the judicial rationale for qualified immunity. In no other context is the problem of over-deterrence—more precisely, the problem of unintended deterrence of legitimate acts—more keenly felt.”).

28. *Town of Newton v. Rumery*, 480 U.S. 386, 398 (1987).

deterrence hypothesis, we should begin with a normative point. Knowing violations of the Constitution cannot be justified by police calculations of costs and benefits. Suppose police have probable cause to believe that a murder weapon can be found in a particular house, but they have no warrant to search. Suppose, further, that they know the house to be temporarily unoccupied. Entry therefore would disturb no one. Suppose further that the residents have left a window open, so that the police could enter without doing any damage to property. The police have no warrant, but they are confident one would be issued if they applied for one. They are also confident that their department would cheerfully pay whatever a tort suit might cost to make a major case. Exclusion gives them an incentive not to enter—is this over-deterrence?

The Supremacy Clause says no. Presumably the compelling-state-interest safety valve applies in Fourth Amendment cases, so that if catastrophic consequences would follow from compliance with the usual constitutional rules, the police might disregard those rules *without* violating the Constitution. Congress can make a law authorizing censorship of the news in wartime, the text of the First Amendment notwithstanding. In the Fourth Amendment context, the compelling-state-interest doctrine might justify city-wide searches, without particularized suspicion, for weapons of mass destruction plausibly suspected to be concealed by terrorists. If, however, we leave the compelling interest scenario aside, the police should do exactly what the exclusionary rule encourages them to do—get a warrant, even if this means that the evidence may disappear before it can be seized.

The same normative analysis applies to searches permitted by the Constitution without warrants but only on condition of probable cause or reasonable suspicion. Suppose 1000 cars are parked by a valet service for a Rolling Stones concert. The police could, at negligible cost, seize the keys from the service and search every vehicle. Does the Fourth Amendment permit them to balance the costs of search against the value of evidence, or does it rather balance those values independently of current policy preferences by requiring probable cause?

The position I am defending is different from the claim that the Fourth Amendment establishes a property rule rather than a liability rule.²⁹ I have tried over the years to conceptualize the Fourth Amendment as a liability rule or a property rule, but the private-law dichotomy does not easily transpose to a constitutional limit on the public force. Indeed, because the property/liability distinction turns on remedies rather than rights, the variety and

29. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

controversy over Fourth Amendment remedies renders the private-law distinction problematic in this context. Rather, the Fourth Amendment protects particular individual interests against government encroachment absent specified prerequisites. This substantive rule is protected by a mix of remedies. Egregious violations are punishable by both criminal sanctions³⁰ and punitive civil damages.³¹ Ongoing violations can be enjoined,³² even when undertaken in good faith based on legal advice.³³

Professor Kontorovich makes a useful point by distinguishing slow-moving from fast-moving Fourth Amendment events.³⁴ Obviously enough, in most cases, Fourth Amendment violations can be remedied only ex post, typically by exclusion, damage actions, or both. To say that ex post remedies are the only ones we have is not to say that the sanction for violations should equal either the victim's loss or the violator's gain, because in the Fourth Amendment context these are different.

There may be violations for which damages provide the best practical remedy, but those damages are not, and should not, be limited by compensation but rather set high enough to eliminate all but irrational incentives for violation. Private law abhors holdouts and eccentrics; the Fourth Amendment protects them. The government has no more right than, say, Bill Gates to break into houses or lock people up with a cheerful willingness to pay damages ex post.

What makes some knowing violations of the Fourth Amendment look attractive is the failure of substantive doctrine to factor the seriousness of the suspected offense into the determination of reasonableness. Professor Stuntz has criticized the transsubstantive character of Fourth Amendment jurisprudence.³⁵ Prevailing doctrine might be justified by the tendency of

30. *E.g.*, *Koon v. United States*, 518 U.S. 81 (1996) (appeal of sentence imposed following conviction of police officers accused of the Rodney King beating which was recorded on videotape).

31. *E.g.*, *Wilson v. Aquino*, 233 F.App'x. 73 (2d Cir. 2007) (upholding punitive damage judgment for illegal body-cavity search).

32. *E.g.*, *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966) (enjoining search of hundreds of homes based on arrest warrants for two individuals).

33. *See, e.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67 (2000); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

34. *See* Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135, 1178–79 (2005) (distinguishing warrant-clause cases from reasonableness-clause cases, and arguing that latter cannot be litigated ex ante so that Fourth Amendment should be understood as a liability rule). I find this analysis unsatisfying. For one thing, administrative searches are analyzed under the reasonableness clause, not the warrant clause, but are typically tested by suits for injunctive relief, as in the drug testing and roadblock cases. More fundamentally, the property/liability dichotomy does not tell us whether to choose compensatory or deterrent measures for sanctions ex post. In, for example, a police homicide case like *Tennessee v. Garner*, 471 U.S. 1 (1985), the only feasible remedy is ex post. It does not follow that the amount of damages should be compensatory rather than punitive.

35. William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*,

judges to consider offense severity in practice. However one resolves the transsubstantive issue, the issue is one of substantive rather than remedial law.

In the Fourth Amendment context, then, over-deterrence does not mean that the monetized expected value of evidence that might be found from illegal searches exceeds the expected damages to be paid for those searches. The substantive constitutional provision has balanced the costs and benefits of those searches quite differently. Over-deterrence of constitutional violations therefore means discouraging *lawful* police actions in a pool of cases where the legality of prospective actions is uncertain.

If we take the substantive Fourth Amendment law as given and worthy of content-independent respect, it follows that the police should be trained to refrain from searches and seizures whenever the proposed action is more likely than not illegal. The reverse is not true; the police may often gain an advantage by delaying a stop, search, or arrest for some time after they have established legal grounds. The current remedial mix would over-deter if, and only if, the police have a net incentive to refrain from searches and seizures for other than tactical reasons even when the potential action is probably legal.

2. Police Incentives

Police behavior on the street is the product of a long sequence of agency relationships. Voters elect a municipal government, the government establishes a police force, and the administrators in charge of the force train its officers and reinforce this training by rewarding compliance and punishing noncompliance. A brief look at the relationship between officers on the street, whose conduct is the *actus reus* of any Fourth Amendment violation, suggests that the focus of policy analysis should be on police administrators.

Individual officers do not internalize either the benefits or the costs of Fourth Amendment activity.³⁶ When the police apprehend an offender, they may improve their performance evaluations and gain prestige within the force. They do not, however, pocket what the community is willing to pay to prosecute and punish the offender.

Nor do individual officers internalize the costs of Fourth Amendment activity. The police get paid whether or not they are deployed to their highest use. If police seize evidence in violation of the Fourth Amendment, the

114 HARV. L. REV. 842 (2001).

36. See Jeffries, *supra* note 18, at 267.

evidence may be suppressed, but the police are not automatically fined or jailed. Although the practice is somewhat subterranean, cities and departments apparently pay for the defense of lawsuits against individual officers, and, when the individuals are liable, indemnify the individual officers for the cost of damages or settlements.³⁷ Individuals therefore do not internalize (or expect to internalize) these costs.³⁸

So the law influences street-level behavior primarily by giving police administrators incentives to train and discipline the force to comply with constitutional requirements. Call whoever is in charge of the police the employer, R. Let us assume that R is rational actor with an incentive to maximize measurable indicia of crime control (arrests, clearance rates, convictions, reductions in reported crimes, maybe even victimization survey numbers). Let us further assume that R is obligated, by contract or custom, to defend and indemnify employees against civil rights actions.

Built into this model is an important and nonobvious assumption. The model assumes that R has no content-independent respect for law. If R has a taste for complying with formal legal prescriptions, R will train and discipline the force to be more compliant than the model predicts. The assumption is debatable but in my view justified by the available information.³⁹

R will train and discipline the force NOT to act unless:

$$EB \geq EC$$

Where EB is R's expected benefit from action and EC is R's expected cost. EB, the expected benefit, can be broken down into non-evidentiary benefits (NEB) and evidentiary benefits (EVB). NEB includes such gains as discouraging crime by visible patrol presence or preventing domestic violence

37. *Id.*

38. *See id.* (“[I]n cases of flagrant misconduct (of the sort that might trigger criminal prosecution), a government might cut its employee loose, but it is hard to imagine a case of simple search and seizure (unaccompanied by assault or other grievous harm) provoking that reaction. Thus, although government officers cannot capture the social benefits of their actions, neither do they pay the full costs.”)

39. The political incentives facing public officials responsible for the police are distinctly tilted in favor of security over liberty. I remain convinced of the basic soundness of the position I advanced in 1993. *See* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice, or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993). For a more recent resume of the supporting argument, see Donald A. Dripps, *Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School*, 3 OHIO ST. J. CRIM. L. 125 (2005). Professor Rosenthal, in distinguishing public from private liability-based incentives, seems to agree that sanction that might be optimal from the perspective of a private firm may be inadequate to ensure constitutional compliance by public entities. *See* Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 842-43 (2007) (“Even aside from political opportunity costs, liability-producing conduct may have political benefits that offset the deterrent effect of liability. To use Professor Levinson's example, a program of aggressive stop-and-frisk of young males in high-crime areas may increase liability, but it also may pay such handsome political benefits that liability will have no deterrent effect.”)

by arresting the abusive boyfriend. EVB includes the gain from enabling prosecutions based on evidence expected from a prospective action.

EC can be broken down into opportunity cost (OC) and liability cost (LC). Once the funds are appropriated to pay for the force, the cost of those funds is fixed. The force itself, however, can be deployed in different ways. Police engaged in routine patrol could be working undercover drug operations or gang investigations. The size of OC depends on the expected benefits from the next-best use (NBU) that might be made with the quantity of resources (QR) devoted to any given operation.

R has an incentive to deploy the force to its highest uses measured by whatever combination of crime-control measures R adopts. The next-best use for marginal police resources is the value of R's highest unmet priority—which is small enough that given R's budget constraint that priority is not addressed at all. The size of OC therefore to some extent depends on whether the police face a target-rich or target-poor environment. OC will be greatest when a police operation consumes large resources in a target-rich environment and smallest when the operation consumes modest resources in a target-poor environment.

The primary effect of the exclusionary rule is to reduce EVB. If the police are certain that a proposed search will be held legal, EVB is unchanged. If the police are certain that it will be held illegal, EVB is reduced to zero. In uncertain cases, if evidence is found, there will be a probability of exclusion; call it PX. The effect of the exclusionary rule is to multiply EVB by $(1 - PX)$.

The risk of exclusion also changes the opportunity cost term because one cost of a search is the risk that the evidence will be discovered at a time when the police lack probable cause or reasonable suspicion but could have established it later had they delayed and sought additional supporting information. This cost—the normatively relevant cost of exclusion—is reduced, but not eliminated, by the inevitable discovery exception. The inevitable discovery exception requires proof by a preponderance that the tainted evidence would have been found later and lawfully but for the premature police intervention.⁴⁰ In some cases the evidence would have been found later and lawfully but the prosecution will not be able to prove this. This cost is genuine, but given the inevitable discovery exception, and the readiness of judges to make the required finding, I will treat it as negligible.⁴¹

40. *Nix v. Williams*, 467 U.S. 431, 444 (1984).

41. *See Dripps, supra* note 15, at 2.

So viewed the exclusionary rule is less a penalty for police illegality than a bounty for legality. This bounty can influence police behavior because the opportunity costs and liability risks of action may outweigh the non-evidentiary benefits but not the total benefits of action. The exclusionary rule reduces the expected evidentiary benefit in direct proportion to the probable unlawfulness of the prospective search or seizure.

LC has two components, the probability of damages (PD) and the quantity of damages expected (QD). We can now describe the incentives facing R by the equation:

$$NEB + (EVB * (1 - PX)) \geq (QR * NBU) + (PD * QD)$$

The police should act only when they expect the gains, discounted by the risk of exclusion, to outweigh the opportunity cost plus the risk of damages.

The present remedial mix would be over-detering if PX, PD, and QD are high enough to eliminate the expected net benefit from searches that are probably legal and otherwise cost-beneficial according to R's utility function. If this were true, we would expect the police to refrain from justifiable but borderline searches by choosing to intervene only when the legality of their actions is highly probable. I think this hypothesis can be tested against empirical evidence on the success rates of different types of searches.

Fourth Amendment law's primary requirement is of some level of antecedent suspicion. Searches for evidence can only be justified by probable cause. Investigative stops can only be justified by reasonable suspicion. If we could agree on numbers for probable cause and reasonable suspicion, and if we knew the success rates the police were encountering in a large sample of cases, we would have some evidence bearing on the over-deterrence hypothesis. If hit rates were substantially higher than the prescribed level of antecedent probability, police would be refraining from high-probability searches.

It might be the case that hit rates are so high that the likely explanation would be that police action was limited not by the legal rules but by resource constraints. That seems implausible. Clearance rates for the index crimes are in the vicinity of 20%.⁴² That suggests not only a target-rich environment (a high rate of offenses relative to police resources) but also that the targets are not easy to hit. Police searching at random would not discover a great deal of evidence. If hit rates are high, it is because OC and LC are high relative to NEV and $(EV * 1 - PX)$.

42. *See id.*

3. Testing the Over-deterrence Hypothesis

Has the current remedial mix had a chilling effect on police actions that are probably legal? This seems improbable, both from the incentives created by the current mix and from what direct evidence we have of police behavior. When police action is of debatable legality, the immunity defense insulates the officer from liability, and thereby the employer from indemnification. Exclusion reduces but does not eliminate the value of borderline actions, as police administrators probably derive considerable utility from seizing drugs and weapons even if these may not be used in court.

The exceptions to exclusion of tainted evidence are one reason.⁴³ The standing rule in particular means that the police can rationally anticipate some legal benefit from illegal searches when group criminality is suspected. When the police illegally seize contraband, the drugs or guns are off the streets even if they cannot be used as evidence. Many, probably most, arrests are made with no expectation of discovering evidence in the incidental search.

If the adjudication of suppression motions frequently resulted in false positives—erroneous findings that the police had acted illegally—exclusion might discourage borderline but lawful actions. If errors are distributed randomly, however, police administrators would expect false positives to be balanced by false negatives. In all probability, false negatives are more likely than false positives. Sympathetic judges and police perjury reduce the probability that evidence illegally seized in fact will be ruled so in court.

This assessment of the legal incentives facing police decision makers is consistent with the most plausible empirical test of over- or under-deterrence. The literature contains a considerable number of studies measuring the success rates of different types of searches and seizures. We can compare the “hit rate” with the level of antecedent suspicion the law requires for each species of search-and-seizure.

If the hit rate is clearly above the legally required zone of *ex ante*

43.

The combined effect of exceptions to the rule and restrictions on collateral review has been to leave exclusion of illegally seized evidence primarily in the hands of state courts. There surely are differences among states in the administration of the Fourth Amendment, but those differences are unlikely to affect egregious cases. Few object to suppression of evidence for flagrant illegality. Difficulties arise in borderline cases, where the mere fact that the constable blundered seems an inadequate reason to set the criminal free. One suspects that many courts in many places strain to avoid that result. Yet it is precisely in the context of the borderline mistake, the everyday close call that should have been made differently, that alternative remedies are hardest to find.

Jeffries & Rutherglen, *supra* note 27, at 1407 (footnotes omitted).

probability in a large sample, we could infer either very high opportunity costs (a police force so small relative to offenses that it can process only high-probability cases, quite aside from remedies for legal violations) or over-deterrence (the police have the capability to engage in high-probability searches but refrain because of the fear of exclusion and damages). If, by contrast, the hit rate is clearly below the legally required zone of ex ante probability, we could infer either very low opportunity costs (the police have so many resources relative to offenses that only low-probability cases are left to pursue) or under-deterrence (the police engage in lots of low-probability, and therefore unlawful, searches because the benefits of even low-probability cases exceed the costs).

Prior exclusionary rule research, and more recent research on racial profiling, has given us some evidence of the hit rates for, respectively, search warrants for private premises; warrantless vehicle searches during traffic stops based on probable cause under *Ross* and *Acevedo*; and *Terry* stops of citizens on the streets. The evidence is not as extensive as might be wished, but it *is* evidence, as distinct from mere conjecture of the sort set forth by the *Hudson* majority. Let us look at what we know about warrant searches, warrantless automobile searches, and *Terry* stops.

a. Warrant Searches

The Fourth Amendment requires probable cause to issue a search warrant. The Supreme Court has resisted quantifying probable cause,⁴⁴ but the governing idea in the cases is that probable cause is present when the expected probability of success exceeds 50%, while a lower probability may sometimes suffice. The Supreme Court has read the amendment to *require* warrants for some searches, primarily entry of homes without consent.

The warrant requirement increases OC, because, aside from the collection of the information showing probable cause, the preparation of the application and the process of presenting the application to a judge both

44. See *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (“The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. We have stated, however, that ‘[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt,’ . . . and that the belief of guilt must be particularized with respect to the person to be searched or seized.”)

In the leading case, *Illinois v. Gates*, the Court equated probable cause with a “fair probability.” 462 U.S. 213, 238 (1983). One might argue that less likely than not is improbable and so no probability at all, fair or foul. On the other hand, in *Pringle*, the majority shied away from any numerical expression of required probability. 540 U.S. at 371. Probably the best that can be said is that the probable cause standard is “a relatively high level of certainty akin to a more-likely-than-not standard.” Christopher Slobogin, *Transaction Surveillance by the Government*, 75 *Miss. L.J.* 139, 150 (2005).

consume significant amounts of police time.⁴⁵ Search warrants have little NEB; police applying for a warrant are motivated by the desire to obtain admissible evidence. We should therefore expect that the police will seek warrants only when EVB is high—above the rough-and-ready 50% hit rate that would satisfy the probable cause standard.

In 1972, Michael Rebell found that 64% and 70% of search warrants executed in two different years in the same Connecticut jurisdiction resulted in the seizure of some of the target evidence.⁴⁶ A study for the National Center for State Courts examined warrant practice in seven cities and found that the success rate for warrant searches (based on returns filed that listed that some of the target evidence was seized) ranged from 79% to 93% in six of the seven cities studied.⁴⁷ More recently, a study by Laurence Benner and Charles Samarkos of search warrants issued by state courts in San Diego found that 65% of the executed warrants authorizing searches for illegal drugs resulted in the seizures of the target evidence.⁴⁸

Warrant searches succeed at a rate that matches or exceeds the hit rate prescribed by the applicable legal standard. Does this suggest over-deterrence? Probably not. The numbers for success have not changed dramatically since *United States v. Leon*,⁴⁹ even if the quality of the applications may have suffered. *Leon* and *Malley v. Briggs*⁵⁰ mandate that a defective warrant, absent gross ignorance or deliberate perjury on the part of the police, will trigger *neither* exclusion *nor* damages. The likely explanation for the high rate of success for searches pursuant to warrants is opportunity cost. Quite aside from the remedial mix of damages and exclusion, which have been withdrawn from warrant searches absent the most egregious facts, police who seek and execute warrants are interested in evidence and generally have probable cause.

If we view the warrant requirement solely as a means to the end of ascertaining probable cause in the most rational way, hit rates over 50% would indeed suggest over-deterrence. There is, however, no exception to

45. See Donald Dripps, *Living with Leon*, 95 YALE L.J. 906, 926–27 (1986).

46. Michael A. Rebell, *The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards*, 81 YALE L.J. 703, 723 (1972).

47. RICHARD VAN DUIZEND ET AL, NAT'L CTR. FOR ST. CTS., *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES* 50 tbl.2-19 (1985). These percentages were obtained by taking the percentage of searches in cases in which returns were filed that led to seizure of some item named in the warrant and multiplying that percentage by the percentage of warrants for which returns were in fact filed. *Id.* at 46, 50 tbl.2-19.

48. Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. W. L. REV. 221, 249 (2000).

49. 468 U.S. 897 (1984).

50. 475 U.S. 335 (1986).

either the substantive right or the exclusionary remedy when police act without a warrant even though probable cause is clearly present. It would seem to follow that the warrant process has additional purposes, including that of putting a costly hurdle between the police and the most sensitive Fourth Amendment interests—the privacy of the home and of confidential communications.⁵¹

The remedial mix enters the warrant context by framing the opportunity cost issue. Why would the police bother with the costly warrant process? Because the remedial mix makes bypassing warrants too costly. Search warrants are usually sought for home invasions and electronic surveillance. Absent consent or exigency, which the courts have been pretty scrupulous about with respect to home searches, the police know that home invasion requires a warrant. Judges facing a motion to suppress for a warrantless *home* search are willing to suppress and may feel no real choice about the matter. Citizens whose homes have been invaded may well bring suit, and police who enter homes without warrants are not likely to win on the immunity defense.

So it is not implausible—but all things considered probably incorrect—to say that the success rate for warrant searches should be near the 50% number the probable cause standard might suggest. To the extent that the Fourth Amendment requires the police to get warrants based on probable cause, the constitutionally-prescribed hit rate is higher than what we would expect if the Fourth Amendment required only probable cause. The warrant requirement adds the cost of the warrant process to the requirement for home invasions, not just as a matter of police tactics but as a matter of the Fourth Amendment's constitutional trump over ordinary policy considerations. Given the legal requirement of both probable cause and a (costly) warrant, we should expect the hit rates from warrant searches to be somewhat above the 50% threshold—which is where it turns out that they are. Only if the costs to police of obtaining warrants were reduced to zero would we expect the hit rate to be 50%.

If hit rates for warrant searches are thought too high, the curtailment of both exclusionary and damage remedies for searches authorized by warrants suggests that the “culprit” is the cost of the warrant process. Action to reduce that cost to the police might move the hit rate closer to the 50% rate we might expect from a perfect assessment of probable cause *ex ante*.

Abolition of the exclusionary rule means that the police would enjoy

51. See Stuntz, *supra* note 35, at 848 (“[R]equiring a warrant is a good thing if, but only if, the substantive standard applied to the search would otherwise be too low—if, that is, police will be too quick to search unless they are forced to get a warrant.”).

the full evidentiary benefit of illegal warrantless home invasions. There are two possible scenarios. If the specter of tort liability is strong enough, nothing will change. No extra evidence will be discovered (and so much for the exclusionary rule's social costs!). If, however, admissibility of the evidence changes the balance of incentives so that the risk of tort liability is deemed worth the cost of a search that both the training department and the executing officers know is illegal, evidence will be obtained but only by treating the Constitution as unworthy of content-independent respect.

Both scenarios would play out. When the police expect the search victim to lack the means, the pluck, or the equities predictive of success in tort to actually sue, warrantless home invasions, a' la *Mapp*, would flourish. Evidence of crimes by the wealthy, well-educated, and politically-connected would be just as inaccessible to justice as with the exclusionary rule.

b. Warrantless Searches

Warrantless searches for evidence, independent of arrests, occur almost exclusively in the context of automobiles. For these searches the police need probable cause but not a warrant. Prior to the racial profiling controversy, warrantless searches were hard to study. Police executing a warrant are obligated to make a return to the court, creating a documentary record. No such record typically accompanies a warrantless search.

Now, however, we have some data on auto searches, developed to address the controversy over racial profiling. Much of this data concerns the initial decision to stop, rather than the later decision to search. When hit rates for stops are reported, the search might be based on consent or an incident to arrest rather than as a free-standing search for evidence based on probable cause. It is difficult to parse the data to find hit rates for this particular species of police behavior.

Sam Gross and Katherine Barnes carefully analyzed data collected by the Maryland State Police.⁵² These officers were required to report traffic stops and subsequent searches and to identify when the search was based on consent. Treating all non-consent searches as based on a claim of probable cause, they found the hit rate for these latter searches to be just under 48.4%.⁵³ Again, at least superficially, that is about where the law says it ought to be.

Gross and Barnes point out two reasons to think that the Maryland

52. Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 662–70 (2002).

53. *Id.* at 674 tbl.9.

data overstate the hit rate—perhaps dramatically. First, the police disliked the reporting requirement and were, one supposes, far more likely to report hits than misses.⁵⁴ Second, when the data are parsed for the importance of the evidence seized, the overall hit rate is far less impressive. If we factor out trace and personal quantities of marijuana, the hit rate for Maryland probable-cause searches falls to 9.8%.⁵⁵

Now of course possessing marijuana for personal use is a crime. It is not, one supposes, what the police were looking for. A bigger reason to discount the hit rate, however, follows from the fact that in many cases probable cause for the vehicle search is derived from discovery in plain view (or plain smell) of a personal supply of marijuana. In these cases, the search shows up in the overall statistics as a hit, even though the probable-cause based search discovered nothing at all.

If the primary mission of the police who make traffic stops is traffic enforcement, the opportunity cost of the time added to each stop by a thorough search of the vehicle is high. Traffic violations are ubiquitous, the state gains revenue from citations, and the police have incentives to issue those citations. In a study of the North Carolina state police, William Smith and his colleagues found that troopers on patrol for speeding or other traffic infractions almost never searched and were loath to do so.⁵⁶

If, however, the primary police mission is drug interdiction, OC is lower. Undercover investigations to build a record for warrant searches are time-consuming and dangerous. Sell-and-bust operations are easier but net only ordinary users. LC for the search, independent of the stop, is low. Qualified immunity means that liability attaches only to police who are clearly mistaken about the probable cause issue, and reasonable people can often disagree about whether probable cause is present or not. Damages for an illegal roadside search are not likely to be high.

So, for warrantless searches, the remedy with the most influence on police behavior is the exclusionary rule. Gross and Barnes' numbers on their face suggest no over-deterrence. Regarded realistically, they suggest some degree of under-deterrence.

54. *Id.* at 679 (“[Troopers] very likely did distort the records in these data by simply failing to report unsuccessful searches, a type of conduct that is also familiar from reports in New Jersey and New York.”) (footnotes omitted).

55. *Id.* at 700 tbl.14. The 9.8% figure is obtained by adding the 3.7% hit rate for small dealers to the 6.1% hit rate for medium/large dealers.

56. WILLIAM R. SMITH ET AL., THE NORTH CAROLINA HIGHWAY TRAFFIC STUDY, FINAL REPORT TO THE NATIONAL INSTITUTE OF JUSTICE, U.S. DEPARTMENT OF JUSTICE 157 (2003), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/204021.pdf> (“The regular road troopers we talked to were not enthusiastic about searches in the least, and it is clear that they view unnecessary searches, in general, as a nonproductive use of their time.”).

c. *Terry Stops*

Under *Terry v. Ohio*⁵⁷ and its progeny, the police may detain a suspicious person for investigation if they have what the cases call “reasonable suspicion” to believe he is engaged in criminal activity. If the courts have been reluctant to quantify probable cause, they have been even less willing to quantify reasonable suspicion. The officer is said to need “a reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot.’”⁵⁸ An anonymous tip corroborated only by police observation of innocent details in the tip falls short of this standard.⁵⁹ Presence on the streets in a high-crime neighborhood, coupled with flight from the police on sight, is enough.⁶⁰ If the police are justified in stopping the suspect, they may conduct a protective pat-down search for weapons if specific facts are present to suggest that the suspect might be dangerous.

The opportunity cost of these street encounters is relatively low. The police are still present on the street, and if they hear gunfire or someone shouting “Stop, Thief!” they can abandon their speculative encounter and address the emergency. At the scene of their deployment they produce the non-evidentiary benefits of a visible patrol presence, but unless they stop people they will have no evidentiary gains unless they see an offense *in flagrante*. From a crime-control standpoint, they have an incentive to stop and frisk the most suspicious person in the area, regardless of just how suspicious that individual happens to be.

Liability risk for *Terry* stops is also low. Because the governing law is expressed as a standard (“reasonable suspicion”) rather than a rule (for example, no entry of private premises is permitted without a warrant, consent, or emergency), the qualified immunity defense protects all but the most egregious violations. Damages from an encounter measured in minutes are not likely to be large. So, as with warrantless searches, the primary incentive to comply with the reasonable suspicion standard is the exclusionary rule.

If the police have enough evidence *ex ante* to make an arrest, they have no need for the *Terry* procedure. There is a small probability that the suspect will admit criminal activity. While there may be some crime-control benefit from hassling suspected gangsters in public view or dis-

57. 392 U.S. 1 (1968).

58. *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry*, 392 U.S. at 30).

59. *Florida v. J.L.*, 529 U.S. 266, 267–68 (2000).

60. *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000).

suading a suspect from a planned but never consummated offense, a major reason for these stops is the prospect of discovering drugs or guns. The exclusionary rule's role here is definite but limited. If the police act unlawfully they may lose their case, but the drugs or guns will still be off the streets.

Like warrantless searches, *Terry* stops were hard to study before the racial profiling controversy. That controversy, however, induced several jurisdictions to require police to keep records of search-and-seizure activity, including Maryland and North Carolina as discussed above. The New York Police Department (NYPD) has been recording on-the-sidewalk *Terry* stops since the 1990's. A recent RAND study of half a million reported *Terry* stops by the NYPD found that only 10% of these stops resulted in either an arrest or a citation.⁶¹

The NYPD employs an aggressive version of community policing, and so we might expect the New York City hit rate to be uncharacteristically low. If, however, we are interested in the influence of Fourth Amendment remedies, we are interested in how far an aggressive department feels free to go before the costs exceed the gains. The NYPD believes that neither the exclusionary rule nor the tort remedy eliminates the net benefits from *Terry* stops with a 10% hit rate. The reporting requirement that made the New York data possible, moreover, increases OC for stops. We might well expect the hit rate to be lower in jurisdictions with comparable police tactics but no reporting requirement. Unless reasonable suspicion means something like an outside chance, the remedial mix is under-detering illegal *Terry* stops.

The RAND data shed some interesting light on the frisk part of stop-and-frisk. The data show that the police frisked only a minority, roughly a third, of those stopped.⁶² This may be a reporting artifact but that seems improbable given that in the other two-thirds of these cases the police did bother to fill out the form recording the stop itself. The hit rate for these frisks is quite low, with some contraband being recovered in between 5.4% and 6.4% of frisks.⁶³ The numbers vary a bit across racial groups, but across groups, roughly speaking, one percent of frisks recovered a weapon.⁶⁴

Some contraband was recovered in 6.4% of frisks of whites, 5.7% of

61. GREG RIDGEWAY, ANALYSIS OF RACIAL DISPARITIES IN THE NEW YORK POLICE DEPARTMENT'S STOP, QUESTION, AND FRISK PRACTICES xi, xv (2007).

62. *Id.* at 37 (Table 5.2).

63. *Id.* at 41-42.

64. *Id.* at 42.

blacks, and 5.4% of Hispanics.⁶⁵ The recoveries were primarily of drugs: “For every 1,000 frisks of black suspects, officers recovered seven weapons; for every 1,000 frisks of similarly situated white suspects, they recovered eight weapons, a difference that is not statistically significant.”⁶⁶

What can we learn from these numbers? The very low rate at which the police recover weapons stands to reason. They face an immediate, personal, and potentially infinite cost if the suspect resorts to lethal resistance. The finding that the police are not frisking almost every suspect stopped is somewhat surprising. In any event, it seems that if the police do fear armed resistance, the exclusionary rule is unlikely to influence their behavior.

The substantive law makes weapons but not drugs fair objects of the so-called protective search. If the exclusionary rule creates incentives that trump officer safety, over-detering justified frisks for weapons, we would expect to see much higher hit rates for weapons. The six or seven to one ratio of drugs to weapons recovered might mean that the police often frisk the suspect not because they subjectively fear for their safety (the only legally-cognizable ground for a frisk) but because they hope to discover illegal drugs. If this is the reality the numbers reflect, the current remedial mix would be under- rather than over-detering.

d. Police Brutality

The worst forms of unconstitutional police misconduct—police brutality—have no EVB, and so the exclusionary rule has no direct disincentive effect. Brutality does have a relatively high LC. There is enough police brutality to doubt that the tort sanction is over-detering it (recall that when illegality is certain there is no risk of over-deterrence), as “[t]he national average among large police departments for excessive-force complaints is 9.5 per 100 full-time officers.”⁶⁷ However one regards the present tort/crime/discipline remedial mix for police brutality, the exclusionary rule debate is largely irrelevant to the brutality problem. Abolition might signal *carte blanche* to the police and thereby encourage brutality by implication. In a rational actor model, however, abolition of the exclusionary rule would not change training or discipline with respect to police violence.

65. *Id.* at 41–42.

66. *Id.* at 42.

67. Susan Saulny, *Chicago Police Abuse Cases Exceed Average*, N.Y. TIMES, Nov. 15, 2007, at A24, available at <http://www.nytimes.com/2007/11/15/us/15chicago.html>. Some complaints are false, but many citizens decline to complain because they expect no action or fear reprisal.

e. Arrests

As with police brutality, the exclusionary rule has little to do with police incentives. Evidentiary benefit is no consideration at all in most arrests. Arrests are infrequently an instrument of investigation and far more often the end-stage product. In theft and buy-and-bust drug cases, the police hope to find incriminating evidence at the time of arrest, but the bulk of arrests reflect other police incentives.

Warrants for nonappearance are a substantial fraction of arrests. *In flagrante* arrests, whether for purse-snatching, public intoxication, or solicitation of prostitution, are another substantial percentage. Arrests to suppress immediate violence, especially domestic violence, are yet another significant fraction. From a departmental perspective, the expected value of arrests is almost all non-evidentiary. Either the police already have the evidence they need, or the arrest is made for social control purposes other than initiating a prosecution in court.

The exception is the so-called pretextual arrest, where the police make an arrest because they have broader search powers incident to the arrest than they have based on the probable cause or reasonable suspicion standards. In these cases, rules that clearly limit the scope of the search incident tend to discourage pretextual arrests when the suspected evidence is outside the permitted zone of search and tend to encourage pretextual arrests when the suspected evidence is in that zone.

The predicate arrest must be based on probable cause, but no warrant is required except when the police need to force entry into private premises to effect the arrest. We can look to case attrition studies—studies of “lost arrests”—to see how many arrests end in conviction, and thereby construct a sort of “hit rate” for arrests. While the figures vary from jurisdiction to jurisdiction, the figure generally accepted is that half of all arrests result in a conviction and half do not. The most recent numbers are a little lower than that.⁶⁸ That sounds like probable cause, right on the screws.

Whether too high, too low, or just right, current case attrition figures probably are not due to the Fourth Amendment remedies mix. Tort liability for false arrest is part of the cost side of the equation, but drastically limited by qualified immunity. In some atypical cases—drug cases and perhaps a

68. The Bureau of Justice Statistics reports that in 2004, the most recent data available, there were 1,100,210 arrests for selected serious felonies in the state systems, but only 466,480, or just over 42%, resulted in convictions. See U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl.5.0002.2004, available at <http://www.albany.edu/sourcebook/pdf/t500022004.pdf>. This table lists the offenses differently; I generated my number by summing the arrests and convictions across all offenses listed.

few others—the police hope to discover some evidence incident to the arrest, and in these cases, the exclusionary rule may have some influence as well. If this remedial mix were over-detering, we would expect to see substantially lower case attrition rates; that is to say, we would expect the police to concentrate resources in cases where probable cause is clear rather than borderline. It seems more likely that Fourth Amendment remedies have negligible influence on arrests and that police behavior is explicable largely in terms of opportunity cost.

When the police apply for an arrest warrant as part of an ongoing investigation, the opportunity cost, in terms of lost police time, resembles that of obtaining a search warrant but is generally smaller. Bench warrants are not sought by the police, and in any event, most arrests are not authorized by warrant *ex ante*. The opportunity cost of an arrest is the time it takes for the police to find, subdue, and transport the offender before handing him off to the court system's lockup and writing a report.

The opportunity cost of search warrants is measured in days. The opportunity cost of an arrest is measured in fractions of an hour but is still significant. If arrest neither serves immediate social control purposes, nor initiates a promising prosecution, police administrators have reasons to train the force to remain at work on proactive patrol or investigating reported offenses.

f. Summary of the Evidence on the Over-deterrence Hypothesis

The evidence available suggests that the current remedial mix is doing a passable job with respect to home invasions, where the rule-type warrant requirement forces the police into the costly warrant process. The evidence further suggests that, when the opportunity cost for unlawful searches or seizures is low, the current mix is not adequately deterring unlawful police actions governed solely by standards like probable cause and reasonable suspicion. This should concern civil libertarians, but there seems little cause to criticize the current remedial mix for discouraging lawful searches and seizures.

B. *Does a Majority of the Court Believe the Counter-Factual Over-deterrence Thesis?*

The *Hudson* majority's concern with the exclusionary rule's "substantial social costs" is at odds with the over-deterrence thesis. Perhaps most telling is the frequency with which the courts rely on exceptions to the exclusionary rule to admit evidence obtained in violation of constitutional requirements. If the tort sanction were deterring such violations, the exclusionary rule could not exact those "substantial social costs," and there wouldn't be a great deal of tainted evidence available under exceptions to exclusion. There wouldn't be many Fourth Amendment violations to support suppression motions. A judiciary that wanted to eliminate the exclusionary rule without encouraging violations of the Constitution would not do so de jure, but de facto, by crafting effective alternative remedies that made exclusion too rare to care about.

That course, exemplified by eliminating the judge-made qualified immunity defense, really does run the risk of over-deterrence. Given the prevalence of indemnification of individual officers, and the Supreme Court's extensive recognition of bright-line rules, tort liability sans immunity and sans exclusion might move us closer to optimal deterrence. Given the disconnect between tort damages and the expected gain from aggressive policing, we would also have to consider the possibility that such a regime would either under-deter (if, for example, low damages for arbitrary *Terry* stops gave police general search powers of citizens on the streets) or over-deter (if extravagant juries brought back awards high enough to discourage the police from acting in all but clearly legal cases).

Abolishing the exclusionary rule *without* also strengthening other remedies would be as radical a change of the current remedial mix as abolishing qualified immunity. The justices in the *Hudson* majority, however, do not seem to regard the current mix of Fourth Amendment remedies as broken. As we have seen, if the current remedial mix is defective, it is because it gives too little disincentive to engage in unconstitutional searches and seizures with low opportunity costs, especially when the governing law is a standard like probable cause or reasonable suspicion. And if it ain't broke, don't fix it.

That, at any rate, seems to be the upshot of Justice Kennedy's separate opinion. Having joined the exclusionary-rule bashing section of the majority opinion, Justice Kennedy then wrote separately to distance himself from abolition, stating that "the continued operation of the exclusionary rule, as

settled and defined by our precedents, is not in doubt.”⁶⁹ The cynical might wonder why, if the current operation of the exclusionary rule were *not* in doubt, such a declaration would be required. Nonetheless, the tenor of Justice Kennedy’s concurrence matches that of the majority: Regulation of the police in this country in a tolerable balance. Regardless of the merits of that proposition, it is not a proposition that sounds the clarion call for any radical change.

C. *The Supreme Court’s Power over Search-and-Seizure*

The exclusionary rule may survive for another reason. The operation of the exclusionary rule brings most Fourth Amendment issues into court, including the Supreme Court of the United States. Damage actions depend on the victim having the gumption to sue and are subject to the qualified immunity defense. One charged with an offense has every incentive to raise Fourth Amendment challenges and will also have counsel to raise the challenge. Hitherto, good faith has not precluded suppression motions for warrantless police actions.

In the past ten years, the Supreme Court has decided only a handful of Fourth Amendment issues in the context of tort suits against the police. If we leave aside a cluster of cases raising issues about the manner of executing a valid warrant, only four damage actions against police have provided vehicles for formulating substantive Fourth Amendment law during this period.⁷⁰ Also during this period, the Court has decided roughly thirty Fourth Amendment cases arising from motions to suppress.

To some extent, this record reflects the rarity with which aggrieved citizens have the will to bring suit. The qualified immunity defense also surely plays a role. Attorneys may discourage plaintiffs likely to lose a summary judgment based on immunity. The Court’s ruling in *Saucier v. Katz*,⁷¹ encouraging an advisory opinion on the merits of the constitutional issue followed by summary judgment based on the immunity defense, recognizes the problem but does not solve it (which explains why the Court

69. *Hudson v. Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring).

70. See *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177 (2004) (holding that Fourth Amendment did not prohibit arrest of *Terry* stop suspect who failed to produce identification as required by state law); *Groh v. Ramirez*, 540 U.S. 551 (2004) (holding that particular description in an application did not cure complete failure to particularize in the warrant itself); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (holding that Fourth Amendment permits warrantless arrest for non-jailable misdemeanors); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (holding that injuries to third parties arising out of high-speed chase by police do not qualify as Fourth Amendment “seizures”).

71. 533 U.S. 194 (2001).

recently receded from the *Saucier* holding in *Pearson v. Callahan*).⁷² The courts can only rule on the merits if someone brings a suit, and people who expect to lose on immunity grounds have no reason to supply the Court with vehicles for judicial law-making. Such empirical evidence as there is suggests considerable reluctance to bring suits.⁷³

Consider, as an example, the rules now in place limiting the scope of the search incident to arrest. In his concurring opinion in *Thornton v. United States*,⁷⁴ Justice Scalia himself forcefully criticized the search-incident-to-arrest rule of *Belton v. New York*.⁷⁵ In search-incident cases, the arrest itself is lawful; the question is whether the police exceeded the scope of their incidental search power. Defendants incriminated by such searches may have an incentive to seek a modification in prevailing law, even if also pressing alternative theories.

What tort plaintiff is going to sue police for a search-incident that *complied* with the existing *Belton* rule? The trial court has no choice but to grant summary judgment. If, miraculously, a plaintiff overcame this obstacle and won a ruling narrowing the *Belton* rule, what damages might she expect from the police rummaging through a gym bag in the back seat of her car, given the legality of the arrest?

Abolishing the exclusionary rule would transfer power over search-and-seizure from the Court to state courts and legislatures. In states retaining a state-law exclusionary rule, state courts would become the source of law regulating the police, as they adjudicate suppression motions based on state-constitutional search-and-seizure claims. In the federal system and those states without a state-level exclusionary rule, legislatures would have the power to set standards for police behavior.

72. 129 S. Ct. 808 (2009) (receding from *Saucier* and holding that courts have discretion to decide Fourth Amendment issue before deciding qualified immunity issue). The effect of this ruling on the Supreme Court's power over Fourth Amendment issues became apparent almost immediately. For example, in *Safford Unified School District No. 1 v. Redding*, the Court held that the strip search of a student by public school officials violated the Fourth Amendment before holding that the responsible officials were protected by the immunity defense. 129 S. Ct. 2633 (2009)

73. See Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719 (1988). Schwab and Eisenberg studied case filings and outcomes in three federal district courts. They found remarkably few suits against the police given the volume of search-and-seizure activity:

Interestingly, Table V reveals a modest number of nonprisoner actions against the police, yet constitutional tort actions figure prominently in the debate about alternative mechanisms for enforcing the fourth amendment. Crude extrapolation from Table V suggests that nonprisoners annually file roughly 2,000 constitutional tort actions against the police in federal court.

This must be a tiny fraction of all contested fourth amendment issues.

Id. at 735 (footnotes omitted).

74. 541 U.S. 615, 625–33 (2004) (Scalia, J., concurring).

75. 453 U.S. 454 (1981).

The Court consistently has jealously guarded its power over criminal procedure. For example, in *Michigan v. Long*, the majority ruled that state-constitutional rights provide an independent state ground for granting a suppression motion only when the state court explicitly invokes the state constitution.⁷⁶ The standard constitutional law avoidance canon points in the opposite direction; the federal court should avoid a constitutional ruling if at all possible and should attempt to preserve the result of the state decision if at all possible.

A more famous example is *Dickerson v. United States*, in which the majority rebuffed an attempt by Congress to repudiate *Miranda* by statute.⁷⁷ Chief Justice Rehnquist, hardly *Miranda*'s most likely defender, seemed more hostile to a legislative incursion onto judicial turf than sympathetic to the right to remain silent.⁷⁸

In the Fourth Amendment context, the Court has (and has regularly exercised) the option of reducing the "costs" of the exclusionary rule by changing the content of the substantive law in favor of the government. It would lose this option in a world without the exclusionary rule. Police defendants who have engaged in clearly illegal conduct are likely to settle rather than appeal to the Supreme Court hoping for a change in the law. Simply from the standpoint of preserving institutional prerogatives, it seems unlikely that a majority of the justices would surrender their substantial power over a major issue.

III. THE EXCLUSIONARY RULE AS PHOENIX

Prior to *Mapp*, police in states without exclusionary rules ignored the search-and-seizure provisions of their state constitutions and the formal applicability of the federal Fourth Amendment after *Wolf v. Colorado*. The *Hudson* majority asserts that times have changed and that modern, professional police, subject to the prospects of tort liability, would behave tolerably well in a post-exclusionary-rule world.

No bet! In the first place, as Samuel Walker, on whose work the *Hudson* majority relied, pointed out after the opinion appeared, the exclusionary rule is a major cause of police respect for law. If the rule were eliminated, police administrators would have a dramatically reduced incentive to train their forces in Fourth Amendment law and discipline officers who violate it.

76. See *Michigan v. Long*, 463 U.S. 1032 (1983).

77. 530 U.S. 428, 436–37 (2000).

78. See *id.*

In the second place, there is substantial evidence tending to show that police professionalism actually *increases* the risk that the police will exploit weaknesses in the remedial scheme by violating substantive Fourth Amendment rights for the sake of incriminating evidence. The exclusionary rule gives cities and departments an incentive to train their forces, but the training the police receive seems to be more concerned with admissibility than with legality.

This concern with admissibility is not a relic from some bygone age. There are plenty of reported cases in which the police deliberately exploited the standing rule to obtain incriminating evidence against a target other than the search victim. The persistence of police perjury is a more sinister sign of the same motivation. Police interrogation training programs teaching the officers to question illegally for the sake of obtaining admissible fruits is another such sign.⁷⁹

Opportunity cost would still direct the police to high-probability cases. The tort remedy might be enough to maintain the warrant requirement. It seems hard to believe that the police would not engage in a great many more illegal auto searches and *Terry* stops. In these cases OC and LC are both quite low, and the desire for evidence is a major factor in the incentives facing police.

Legislatures and courts, including the Supreme Court, might respond by strengthening the damage action for violations, authorizing liquidated or punitive damages, or restricting or abolishing the immunity defense. This turn really would risk over-deterrence in a way that the exclusionary rule does not. I doubt that even the current justices would either strengthen the tort action or acquiesce in a wave of police abuse. If the exclusionary rule were abolished, it would be back within a decade.

CONCLUSION

Given a correct normative account of over-deterrence, the available empirical evidence suggests that the current remedial mix is not over-detering Fourth Amendment violations. Indeed, when opportunity cost and the risk of tort damages are both low, the current mix is probably under-detering, perhaps substantially. A majority of the Supreme Court seems to regard this situation as acceptable, which casts doubt upon the proposition

79. See Jessica M. Weitzman, Note, *They Won't Come Knocking No More: Hudson v. Michigan and the Demise of the Knock-and-Announce Rule*, 73 BROOK. L. REV. 1209, 1211–12 (2008) (“[U]nless the exclusionary rule is applied to knock-and-announce violations, police officials may encourage officers to bypass knock-and-announce guidelines in much the same way they have encouraged officers to question suspects ‘outside Miranda.’”).

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that they would dramatically alter the current remedial mix. That the Court would be willing to make this radical change and curtail its own institutional power in the process seems improbable.